SUBJECT INDEX.

	PAGE
Opinion below	1
Inaccuracies in petitioner's statement of the case	2
Statement opposing jurisdiction	3-5
Conclusion	5-6

TABLE OF AUTHORITIES CITED.

Court Decisions:

Central Union Telephone Company v. City of Edwardsville, 269 U. S. 190, 70 L. Ed. 229	3-4
Drainage Commissioners v. Shockey, 238 Ill. 237, 87 N. E. 335	4
Gillespie v. Fulton Oil and Gas Co., 236 Ill. 188, 86 N. E. 219	4
Parker v. Illinois, 333 U. S. 571, 92 L. Ed. 886	3
People v. Richardson, 397 Ill. 84, 72 N. E. (2d) 851	4
People v. Rosenthal, 370 Ill. 244, 18 N. E. (2d) 450	4

Statute:

Section 75 (1), Illinois Civil Practice Act, (Chap. 110, par. 199 (2), Ill. Rev. Stat. 1951)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 848

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* WILLIAM J. KENNEDY,

Petitioner,

vs.

STEPHEN E. HURLEY, CHARLES A. LAHEY, and ALBERT W. WILLIAMS, CIVIL SERVICE COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO CERTIORARI.

OPINION BELOW.

The opinion of the Appellate Court of Illinois for the First District is officially reported in 348 Ill. App. 265, and also is set forth in the printed transcript of the record herein (R. 65-75).

Inaccuracies in Petitioner's Statement of the Case.

Petitioner's statement of the case contains a strange but serious error, namely, that the petitioner (Kennedy) was not the person who had committed the wrongs charged and proved against him on the hearing before the Civil Service Commission, but was a totally different person bearing the same name (Petition, p. 3). There is no basis whatever in the record for this assertion, and this is the first time that the petitioner has made such a claim. Moreover, the findings of fact contained in the Commission's "Findings and Decision" (R. 37-41) are sufficiently specific as to evidentiary detail to establish that the petitioner did commit the wrongful conduct for which he was ordered discharged (R. 39-41).

The petition makes a further serious mis-statement when it accuses the Civil Service Commission of improper practice in reciting in its return to the writ of certiorari (on the review by the Circuit Court of Cook County of the decision of the Civil Service Commission) that the matters and things contained in said return constituted "a full, true and complete transcript of the record" of the proceedings before the Civil Service Commission, although it knew that the transcript of the evidence was not included in the return because it had been lost (Petition, pp. 2-3). However, the record herein discloses that the Commission expressly qualified its certificate by reciting that the matters contained in the return constituted "a true, full and complete record of the proceedings * * * except for the transcript of evidence taken at said hearing, which said transcript has been lost" (R. 42-43).

STATEMENT OPPOSING JURISDICTION.

The only statute upon which petitioner predicates the jurisdiction of this court is Section 2101 (c) of Title 28, United States Code, which is erroneously referred to in the petition (p. 2) as "Section 210 (C) of the Judicial Code of 1949." But this section merely prescribes the 90-day limitation period for review. The petition makes no reference to Section 1257 (3) of Title 28, United States Code, which is the relevant section applicable to the review of State court judgments by certiorari; nor does the record disclose that any federal question, substantial or otherwise, was involved, presented or decided on this record. Indeed, it appears clearly from the opinion of the Appellate Court (R. 65-75), whose judgment the petitioner is asking this court to review, that the Appellate Court did not decide or dispose of any constitutional question.

Moreover, the Appellate Court of Illinois, which is an intermediate appellate tribunal, is without power to determine constitutional issues. Under Section 75 (1) of the Illinois Civil Practice Act, (Chap. 110, par. 199 (2), Ill. Rev. Stat. 1951), the Supreme Court of Illinois is the only court which has the power to pass upon constitutional questions which have been presented to and decided by the trial court, and the party seeking a review of such questions must take an appeal directly from the trial court to the Supreme Court. If the appeal is taken to the Appellate Court of Illinois, all constitutional issues are waived, and when the case proceeds from the Appellate Court to the Supreme Court for further review, no constitutional question is presented for decision in view of such waiver. (*Parker* v. *Illinois*, 333 U. S. 571, 92 L. Ed. 886; *Central*

Union Telephone Company v. *City of Edwardsville*, 269 U. S. 190, 193-195, 70 L. Ed. 229; *People* v. *Richardson*, 397 Ill. 84, 91, 72 N. E. (2d) 851; *People* v. *Rosenthal*, 370 Ill. 244, 247, 18 N. E. (2d) 450.)

While it is true that the appeal from the trial court to the Appellate Court of Illinois was taken by the respondents herein, (against whom the trial court had ruled adversely), it was nevertheless incumbent upon the petitioner to ask for a transfer of the cause from the Appellate Court to the Supreme Court of Illinois if he did not wish to waive any constitutional question which might have been involved in the case. By failing to request a transfer of the cause to the Supreme Court, and contenting himself with permitting the case to remain in the Appellate Court, the petitioner has waived all constitutional questions, state or federal, which may have been presented on the record. (*Drainage Commissioners* v. *Shockey*, 238 Ill. 237, 239, 87 N. E. 335; *Gillespie* v. *Fulton Oil and Gas Co.*, 236 Ill. 188, 204, 86 N. E. 219.) Had petitioner made a timely motion to transfer the cause to the Illinois Supreme Court on the ground that a federal constitutional question was presented for decision, and had the Appellate Court denied said motion to transfer, then the petitioner could have applied to this court for a writ of certiorari to review said order of the Appellate Court denying to petitioner the opportunity to have the question passed upon by the Illinois Supreme Court. This, however, the petitioner did not do and, under the authorities, it is too late for him to raise any constitutional questions, state or federal, at this time.

In any event, petitioner has failed to include in the printed transcript of the record filed in this court any part of his petition for leave to appeal to the Supreme Court of Illinois from the judgment of the Appellate Court. Hence

the record does not show whether any federal question was presented to the Supreme Court of Illinois in the petition for leave to appeal which that court denied (R. 79-80).

Finally, an examination of the record reveals that no federal question was presented at all. The two basic questions involved were (1) whether a transcript of the evidence was necessary to support the Commission's decision where the findings of fact were sufficiently detailed and specific to show that there was evidence to support the order, and (2) whether, in any event, the petitioner was guilty of such gross laches in the prosecution of his action to review the order of the Civil Service Commission as to bar his right to relief. The Appellate Court held that in a common law certiorari proceeding to review an administrative order, the transcript of the evidence is no part of the record, and if the findings of fact are sufficiently specific to show that the order is supported by the evidence, it is not necessary or even proper to refer to the transcript of the testimony to determine whether there was evidentiary support for the administrative decision (R. 65-73). On the issue of laches, the Appellate Court held that petitioner was barred from obtaining relief because of his many years of delay in the prosecution of his action (R. 73-75). It is very apparent that the decision of the Appellate Court on either of these issues did not involve the determination of a federal question. On the contrary, the Appellate Court opinion shows that the decision which the petitioner seeks to review is based upon two separate and independent non-federal grounds each of which is adequate to support it.

Conclusion.

Inasmuch as the Appellate Court could not, and in any event did not, determine any federal question, it is re-

spectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN J. MORTIMER,
Corporation Counsel of the City of Chicago,
L. LOUIS KARTON,
Head of Appeals and Review Division,
ARTHUR MAGID,
Assistant Corporation Counsel,
511 City Hall,
Chicago, 2, Illinois,
Attorneys for Respondents.